



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

February 26, 1998

Ms. Linda Wiegman
Supervising Attorney
Office of General Counsel
Texas Department of Health
1100 West 49th Street
Austin, Texas 78756-3199

OR98-0556

Dear Ms. Wiegman:

You ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 112784.

The Texas Department of Health (the "department") received a request for information concerning A.Q.H.C., Inc. of San Antonio, Texas, a home and community support services agency licensed by the department. You assert that portions of the requested information are made confidential by state statute or by the common-law right to privacy and therefore are excepted from required public disclosure under section 552.101 of the Government Code. We have reviewed the information you have submitted to this office for review.

Section 552.101 of the Government Code excepts from disclosure information that is deemed confidential, including information that is made confidential by statute. We observe that some of the information submitted to this office consists of reports about the home health agency's compliance with federal law as a Medicare provider. Federal regulations require the department to release the HCFA 2567, statements of deficiencies and plans of correction, provided that (1) no information identifying individual patients, physicians, other medical practitioners, or other individuals shall be disclosed, and (2) the provider whose performance is being evaluated has had a reasonable opportunity to review the report and to offer comments. *See* 42 C.F.R. §§ 401.126, .133; Open Records Decision No. 487 (1988).¹ As the reports are signed by a provider representative and the "provider's

¹You claim that common-law privacy and other confidentiality provisions apply to certain information that you have marked in the reports. As we conclude that federal law requires you to release de-identified copies of these reports, we do not address your arguments regarding the confidentiality of the reports under these provisions. *See* Open Records Decision No. 487 (1988).

plan of correction" portion of the report appears to contain the provider's comments to the report, we believe the provider has had a reasonable opportunity to review and comment on the report. Accordingly, you must release these reports, but with deletions of information that identify the persons specified in the regulation.

Next, we note that you raise section 142.009(d) of the Health and Safety Code regarding a group of documents submitted for our review. Health and Safety Code section 142.009(c) authorizes the department to conduct investigations of complaints regarding the provision of home health, hospice, or personal assistance services. Section 142.009(d) provides as follows:

The reports, records, and working papers used or developed in an investigation made under [section 142.009 of the Health and Safety Code] are confidential and may not be released or made public except:

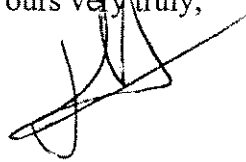
- (1) to a state or federal agency;
- (2) to federal, state, or local law enforcement personnel;
- (3) with the consent of each person identified in the information released;
- (4) in civil or criminal litigation matters or licensing proceedings as otherwise allowed by law or judicial rule; or
- (5) on a form developed by the department that identifies any deficiencies found without identifying a person, other than the home and community support services agency.

We have reviewed the documents for which you assert section 142.009(d) of the Health and Safety Code in conjunction with section 552.101 of the Government Code. You state that the submitted documents are "files, reports, records, communications, and working papers" used or developed in an investigation made under § 142.009. We conclude that section 552.101 of the Government Code in conjunction with section 142.009(d) of the Health and Safety Code excepts the information from required public disclosure². As noted above, however, the statement of deficiencies and plans of correction which were prepared for purposes of a Medicare or Medicaid complaint investigation survey must be released pursuant to federal regulations.

²You also assert that portions of the complaint reports are confidential pursuant to section 5.08(b) of article 4495(b), V.T.C.S. Because we are able to make a determination under section 142.009(d) of the Health and Safety Code, we do not address your arguments regarding the confidentiality of the reports under that provision.

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to be 'J. Monteros', written over the closing 'Yours very truly,'.

Janet I. Monteros
Assistant Attorney General
Open Records Division

JIM/rho

Ref.: ID# 112784

Enclosures: Submitted documents

cc: Mr. Peter Cario
1166 Mesa Blanca
San Antonio, Texas 78248
(w/o enclosures)